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No. _____

IN THE

Supreme Court of the United States

STAFF SERGEANT GREGORY P. BANKER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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May 2007

QUESTION PRESENTED

A general court-martial tried and convicted the petitioner, an active duty member of the United States Air Force, of two specifications of sodomy with LGG under Article 125, Uniform Code of Military Justice. The first specification covered acts allegedly occurring when LGG was "under the age of 16"; the second addressed acts allegedly occurring when LGG was age 16-19. After this Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Air Force Court of Criminal Appeals affirmed the petitioner's conviction for the second specification on the grounds that the petitioner's "progressive grooming of his subordinate babysitter, when she was 14 and 15 years old, spawned a relationship where [LGG's] consent at the age of 16 and older might not easily be refused." *United States v. Banker*, 63 M.J. 657, 660 (A.F. Ct. Crim. App. 2006). The Court of Appeals for the Armed Forces summarily granted and affirmed the Court of Criminal Appeals' ruling. The question presented in this case is:

Whether the Court of Criminal Appeals denied the petitioner's right to advance notice of the nature and cause of the accusation against him and right to have all essential facts determined by a panel of members beyond a reasonable doubt when it used a "grooming" finding, neither alleged in the specification nor presented and contested at trial, to affirm his conviction for the alleged acts of consensual sodomy when LGG was age 16-19?

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The petitioner, Staff Sergeant Gregory P. Banker, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on February 20, 2007.

OPINIONS BELOW

The Air Force Court of Criminal Appeals' earlier opinion is reported at 57 M.J. 699 (Appendix A). The Court of Appeals for the Armed Forces' opinion is reported at 60 M.J. 216 (Appendix B). The Court of Criminal Appeals' opinion on remand is reported at 63 M.J. 657 (Appendix C).

JURISDICTION

On February 20, 2007, the Court of Appeals for the Armed Forces granted the petitioner's petition for grant of review of the Court of Criminal Appeals' decision and affirmed the lower court. (Appendix D) The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867a(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "[n]o person shall ...be deprived of life, liberty or property, without due process of law...." The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...and to be informed of the nature and cause of the accusation...." The

Fourteenth Amendment to the United States Constitution provides that "nor shall any State deprive any person of life, liberty or property, without due process of law...."

Article 66, Uniform Code of Military Justice (UCMJ), Section 866 of Title 10, United States Code [hereinafter Article 66], provides:

> ...In a case referred to it, the Court of Criminal Appeals may...affirm only such findings of guilty...as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may...determine controverted questions of fact....

Article 125, UCMJ, Section 925 of Title 10, United States Code [hereinafter Article 125], provides:

> ...Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy.

STATEMENT OF THE CASE

A general court-martial tried and convicted the petitioner, an active duty member of the United States Air Force, of two specifications of sodomy with LGG under Article 125, UCMJ. The first

specification covered acts allegedly occurring when LGG was "under the age of 16"; the second addressed acts allegedly occurring when LGG was age 16-19. Subsequently, this Court issued its opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), ruling that a Texas statute criminalizing certain intimate acts between consenting adults violated the Due Process Clause of the Fourteenth Amendment. The Air Force Court of Criminal Appeals responded by affirming the petitioner's conviction for the second specification on the grounds that his "progressive grooming of his subordinate babysitter, when she was 14 and 15 years old, spawned a relationship where [LGG's] consent at the age of 16 and older might not easily be refused" – even though the government did not include that theory in the specification or present it to be contested at trial. Because this ruling denied the petitioner his right to advance notice of the nature and cause of the accusation against him and right to have all essential facts determined by a panel of members beyond a reasonable doubt, it merits review.

1. Factual Background

In the summer of 1999, LGG, who had babysat the petitioner's two children from December 1994 to July 1999, accused the petitioner of a variety of sexual offenses. *See* R. 178, 197-98. The convening authority referred several charges and specifications against the petitioner, including the

two specifications of Charge II under Article 125, UCMJ:

> SPECIFICATION 1: In that STAFF SERGEANT GREGORY P. BANKER, United States Air Force, 82d Medical Support Squadron, Sheppard Air Force Base, Texas, did, at or near Sheppard Air Force Base, Texas, and at or near Wichita Falls, Texas, on divers occasions between on or about 23 August 1995 and on or about 27 April 1996, commit sodomy with [LGG], a child under the age of 16 years.
>
> SPECIFICATION 2: In that STAFF SERGEANT GREGORY P. BANKER, United States Air Force, 82d Medical Support Squadron, Sheppard Air Force Base, Texas, did, at or near Sheppard Air Force Base, Texas, and at or near Wichita Falls, Texas, on divers occasions between on or about 28 April 1996 and on or about 1 July 1999, commit sodomy with [LGG].

See R. 9.1. Article 125, UCMJ defines "sodomy" as "unnatural carnal copulation with another person of the same or opposite sex or with an animal"; the *Manual for Courts-Martial* further defines "unnatural carnal copulation" as occurring when a

person "take[s] into that person's mouth or anus the sexual organ of another person or of an animal; or [places] that person's sexual organ in the mouth or anus of another person or of an animal; or [has] carnal copulation in any opening of the body, except the sexual parts, with another person; or [has] carnal copulation with an animal." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 51(c) (2005 ed.). Because LGG was born on 28 April 1980, she was at least 16 years old during the time frame of Specification 2. *See* R. 177.

The petitioner elected to be tried before a panel of officer and enlisted members; he pled not guilty to all charged offenses. *See* R. 9-10. At trial, LGG testified that the petitioner had performed oral sodomy on her "[a] few" times between October 1995 and July 1999, that she had performed oral sodomy on him "[s]everal" times between approximately October 1995 and July 1999, and that he had performed anal sodomy on her "[s]everal" times between summer 1996 and July 1999. *See* R. 178, 189-92, 195-96.

2. Proceedings Below

On February 9, 2001, the panel of officer and enlisted members found the petitioner guilty of both specifications of the sodomy charge, as well as specifications of indecent acts with a person under 16, indecent acts with another and adultery. *See* R. 317-318. The panel sentenced him to a bad-conduct discharge, two years of confinement and reduction

to the lowest enlisted grade. *See* R. 354. The convening authority approved the adjudged findings and sentence. *See* General Court-Martial Order No. 19, dated 20 April 2001, Record of Trial, Vol. 1.

The petitioner appealed to the Air Force Court of Criminal Appeals, which modified the language of his conviction for indecent acts with a person under 16 and set aside and dismissed his conviction for indecent acts with another. *United States v. Banker*, 57 M.J. 699 (A.F. Ct. Crim. App. 2002). He then appealed to the Court of Appeals for the Armed Forces. While his appeal was pending, this Court issued its opinion in *Lawrence v. Texas*; the Court of Appeals for the Armed Forces responded with *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), an attempt to apply *Lawrence*'s framework to Article 125, UCMJ.

In light of its opinion in *Marcum*, the Court of Appeals for the Armed Forces elected to return the petitioner's case to the Air Force Court of Criminal Appeals for consideration of a supplemental issue: "WHETHER APPELLANT'S CONVICTION FOR VIOLATING ARTICLE 125, UCMJ, BY ENGAGING IN CONSENSUAL SODOMY MUST BE SET ASIDE IN LIGHT OF THE UNITED STATES SUPREME COURT'S HOLDING IN *LAWRENCE V. TEXAS*, 123 S.CT. 2472 (2003)." *United States v. Banker*, 60 M.J. 216 (C.A.A.F. 2004). On 29 June 2006, the Court of Criminal Appeals affirmed the same findings and

sentence that it had affirmed in its 2002 opinion. *United States v. Banker*, 63 M.J. 657 (A.F. Cr. Crim. App. 2006). The Court made the judicial finding that the petitioner's "progressive grooming of his subordinate babysitter, when she was 14 and 15 years old, spawned a relationship where [LGG's] consent at the age of 16 and older might not easily be refused." Appendix C, page 64a. Consequently, the Court concluded that the petitioner's alleged conduct with LGG when she was age 16-19 fell outside of the liberty interest that this Court identified in *Lawrence*. *See id.*, page 63a.

On February 20, 2007, the Court of Appeals for the Armed Forces granted the petitioner's petition for grant of review of the Air Force Court of Criminal Appeals' decision and affirmed the lower court in a summary opinion. Appendix D.

REASONS FOR GRANTING THE WRIT

This Court's ruling in *Lawrence* renders the petitioner's conviction of Specification 2 of Charge II unconstitutional. The specification did not allege that LGG was a minor. It did not allege that LGG was susceptible to injury or coercion. It did not allege that LGG was situated in a relationship where consent might not easily be refused. It did not allege public conduct or prostitution. It did not allege that the petitioner had somehow "groomed" LGG for these acts.

At trial, the members heard LGG's description of the alleged acts. They did not hear expert testimony about how the relationship between the petitioner and LGG or their disparity in age may have impacted LGG's ability to consent. No witness provided evidence of what constitutes "grooming," how long it lasts, and whether LGG could make her own decisions at age 16. Upon hearing the evidence, the members found the petitioner guilty of consensual sodomy – essentially the same offense that this Court regarded as constitutionally infirm in *Lawrence*.

Nevertheless, the Air Force Court of Criminal Appeals affirmed the petitioner's conviction. The Court based its ruling on the judicial finding that the petitioner's "progressive grooming of his subordinate babysitter, when she was 14 and 15 years old, spawned a relationship where [LGG's] consent at the age of 16 and older might not easily be refused." Its approach contravened two Constitutional guarantees: advance notice of the "nature and cause of the accusation" and the right to have a jury of members find every essential fact beyond a reasonable doubt. These flaws demand reversal of the petitioner's conviction.

I. THE AIR FORCE COURT OF CRIMINAL APPEALS DENIED THE PETITIONER'S RIGHT TO ADVANCE NOTICE OF THE NATURE AND CAUSE OF THE ALLEGATION AGAINST HIM

As drafted, the specification gave the petitioner notice that he would have to defend against LGG's accusations that he had committed sodomy with her between 28 April 1996 and 1 July 1999. It failed to provide notice that he had to defend against any of the factors articulated in *Lawrence* or *Marcum*, or any of the theories that the government might draw from those factors. It failed to provide notice that he might have to cross-examine witnesses or call experts to rebut those factors or theories, testify against them on his own behalf, or argue against them in closing argument.

As this Court indicated in *Blakely v. Washington*, 542 U.S. 296, 341 (2004), "an accusation which lacks any particular fact which the law makes essential to the punishment is...no accusation within the requirements of the common law, and it is no accusation in reason." Concededly, this Court has ruled that not every civilian-court due process protection must be transplanted into the military setting; the test is "whether the factors militating in favor of [a given due process safeguard] are so extraordinarily weighty as to overcome the balance struck by Congress." *Weiss v. United States*, 510 U.S. 163, 178 (1994). Nevertheless, this Court's precedent demands the conclusion that the notification requirement is necessary for a fair court-martial: in *Dunn v. United States*, 442 U.S. 100, 106-07 (1979), this Court concluded that "[f]ew constitutional principles are

more firmly established than a defendant's right to be heard on the specific charges of which he is accused..." By affirming the petitioner's conviction based on a "grooming" theory, the Court of Criminal Appeals disregarded this fundamental aspect of our criminal justice system.

II. THE AIR FORCE COURT OF CRIMINAL APPEALS DENIED THE PETITIONER'S RIGHT TO HAVE ALL ESSENTIAL FACTS DETERMINED BY A PANEL OF MEMBERS BEYOND A REASONABLE DOUBT

Moreover, the Court of Criminal Appeals violated the petitioner's right to have all essential facts determined by a panel of members beyond a reasonable doubt. It is true that the Court of Appeals for the Armed Forces has ruled that the full Sixth Amendment right to a jury trial does not apply in courts-martial. *See United States v. New*, 55 M.J. 95, 104 (C.A.A.F. 2001). Nevertheless. this Court has been adamant about the unconstitutionality of sentencing arrangements that included mixed jury-judge fact-finding. *See, e.g., Blakely*, 542 U.S. 296; *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court's emphasis on the deeply seated Constitutional underpinning of this right suggests that it, like the notice requirement, is "extraordinarily weighty" enough, under this Court's formulation in *Weiss*, for due process to require it.

The military judge did not ask the members to make any relevant findings beyond whether the petitioner and LGG had committed consensual sodomy between 28 April 1996 and 1 July 1999; the members returned no relevant findings beyond guilty as charged. Consequently, the petitioner's conviction currently stands on a shaky two-legged foundation: the members' finding that he committed consensual sodomy and the Court of Criminal Appeals' finding that "grooming" produced a relationship where LGG might not be able to refuse consent. This is precisely the outcome that this Court's recent precedent should preclude.

While Article 66, UCMJ, does allow the courts of criminal appeals some authority to determine factual matters, the Court of Criminal Appeals' ruling in the petitioner's case disregarded the text and purpose of Article 66. Whether the petitioner "groomed" LGG was not a controverted question of fact at trial, subject to the procedural safeguards that due process and the Sixth Amendment require. The Court used Article 66 to make an end run around the court-martial panel, not to protect the petitioner's rights. The Court of Criminal Appeals misused its fact-finding power to deny one of the petitioner's most fundamental and cherished rights: the right to have his case actually determined by a court-martial panel. His conviction for consensual sodomy should not stand.

CONCLUSION

The petitioner therefore respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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May 2007

Appendix A

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant GREGORY P. BANKER
United States Air Force

ACM 34531
57 M.J. 699

8 October 2002

Sentence adjudged 9 February 2001 by GCM convened at Sheppard Air Force Base, Texas. Military Judge: Gregory E. Pavlik.

Approved sentence: Bad-conduct discharge, confinement for 2 years, and reduction to E-1

Appellate Counsel for Appellant: Captain Patrick J. Dolan (argued, Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy,

Major Maria A. Fried, Major Jefferson B. Brown and Major Jeffrey A. Vires.

Appellate Counsel for the United States: Captain Adam B. Oler (argued), Colonel Anthony P. Dattilo and Lieutenant Colonel Lance B. Sigmon.

Before

SCHLEGEL, BURD, and PECINOVSKY

Appellate Military Judges

OPINION OF THE COURT

BURD, Senior Judge:

On 7-9 February 2001, the appellant was tried by general court-martial composed of officer and enlisted members at Sheppard Air Force Base (AFB), Texas. Contrary to his pleas, he was found guilty of sodomy with a child under the age of 16 years on divers occasions and sodomy on divers occasions, in violation of Article 125, UCMJ, 10 U.S.C. § 925, indecent acts with a child under the age of 16 years on divers occasions, indecent acts with another on divers occasions, and adultery on divers occasions, in violation of Article 134, UCMJ, 10

U.S.C. § 934. He was found not guilty of carnal knowledge under Article 120, UCMJ, 10 U.S.C. § 920. The court members sentenced the appellant to a bad-conduct discharge, confinement for 2 years, and reduction to E-1. The convening authority approved the adjudged sentence.

The appellant has raised three issues before us.[1] The appellant attacks the legal and factual sufficiency of the evidence on all the offenses and claims the military judge made two separate erroneous evidentiary rulings. We will modify the findings on the specification of indecent acts with a child because the evidence does not show that the offense occurred as alleged. We agree with the appellant that the evidence on the offense of indecent acts with another is not legally sufficient and will set aside the findings on that specification. We otherwise disagree with the appellant's assertions. Finally, we will reassess the sentence. We will begin our discussion with a statement of the relevant facts established by the evidence.

---

[1] We heard oral argument on the issues on 29 May 2002.

The Facts

In December 1994, LG began babysitting for the appellant and his wife.[2] LG was 14 years old at that time. Her birth date was 28 April 1980. The appellant had a son (MB), who was then 9 years old, and a daughter, who was younger than the son. The appellant's spouse (CB) worked at a business in the local community with LG's mother. It was through this connection that the Bankers obtained LG's services as a babysitter.

LG babysat for the Bankers once or twice a month until March 1996. At that time, LG became, what she called, "a full-time babysitter," which meant that anytime LG and the Bankers' children weren't in school, she would be at the Bankers' home. She often participated in family activities, e.g., dinners, shopping, attending church activities, watching movies. She would occasionally stay overnight.

Sometime in early 1995, the appellant began to sexually groom LG. While driving her home

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[2] The appellant's age was not introduced into evidence until the sentencing phase of the court-martial. In December 1994, the appellant was 34 years old.

one evening after babysitting, the appellant parked the car while pretending to be lost, and kissed LG and stuck his tongue into her mouth. Apparently, the appellant interpreted LG's reaction as a green light because he soon advanced to deliberately brushing his hand against her breasts and buttocks as they passed in a hallway or doorway. He also introduced LG to pornography by showing her magazines, pictures on his computer, and videotapes, both professionally made and "homemade." Over time, the appellant progressed to more overt indecent acts, sodomy (both oral and anal), and sexual intercourse. The indecent acts, sodomy, and sexual intercourse occurred on multiple occasions. Often, the appellant would initiate these acts in his home while his wife was at work and his children were playing outside or in another part of the house. He also used a van while driving LG home to carry out his lasciviousness.

The appellant continued his sexual abuse of LG until July 1999, when she stopped babysitting for the Bankers. That summer, LG saw the movie *American Pie*. She was disturbed by the movie's portrayal that some men were preoccupied "with getting females' virginity." LG later asked the appellant whether the

portrayal was accurate and the appellant confirmed that, at least for him, it was true. LG was very upset by the appellant's response and she stopped babysitting for the Bankers and engaging in sexual acts with the appellant.

After breaking off relations with the Bankers, LG told a friend about her sexual relationship with the appellant. The friend recommended that LG tell her mother, which she did. LG's mother insisted on telling authorities. Thereafter, the Air Force Office of Special Investigations (AFOSI) opened an investigation into the appellant's activities. When interviewed by an AFOSI agent, LG, after initially minimizing the appellant's conduct, revealed the details of his acts.

Legal and Factual Sufficiency

The appellant claims that the evidence is both legally and factually insufficient to support the findings of guilty. This broad claim is essentially based on the fact that all of the appellant's sexual misconduct is alleged to have occurred with LG, the appellant's assertion that the testimony of LG is not worthy of belief, and that her accusations are inherently improbable. We disagree. We find the testimony of LG to be credible. Further, when considering all the

evidence admitted on findings, we conclude that her testimony was the truth.

The appellant makes additional claims in the event we find LG to be credible. He asserts that the evidence of the appellant's sodomy with a child on divers occasions is insufficient. The appellant claims that the evidence on each of the indecent acts specifications is insufficient. He also asserts that none of the acts encompassed within Specification 2 of Charge III were indecent because LG was at least 16 years old, the acts were consensual, and were not viewed by a third person.[3]

"The test for legal sufficiency requires courts to review the evidence in the light most favorable to the Government. If any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient." *United States v. Reed*, 54 M.J. 37, 41 (2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) and *United States v. Turner*, 25 M.J. 324

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[3] While we see reason to disagree with the appellant on the issue of indecency, we need not reach this issue because of our conclusion that the evidence is legally insufficient to prove the appellant's guilt of Specification 2 of Charge III.

(C.M.A. 1987)). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the [Court of Criminal Appeals] are themselves convinced of the accused's guilt beyond a reasonable doubt." Turner, 25 M.J. at 325, quoted in Reed, 54 M.J. at 41.

The appellant's sexual misconduct with LG occurred over four and one-half years, it started when LG was 14 and continued until she was 19. The allegations of sodomy and indecent acts reflect a break in time, 28 April 1996, which is the day LG turned 16.

The prosecution introduced enough evidence and conducted a sufficiently specific direct examination of LG to establish the legal and factual sufficiency of the two specifications of sodomy under Charge II and the adultery under Charge IV. However, we conclude that the trial counsel failed to ask the questions of LG necessary to establish with sufficient specificity that the indecent acts occurred as specifically charged.

Both Specification 1 and Specification 2 of Charge III allege that the appellant committed indecent acts with LG on divers occasions

during the separate time periods alleged by "fondling her breasts and private parts with his hands and digitally penetrating her vagina." LG testified that the appellant, among other things, put his fingers in her vagina in the spring of 1995. The trial counsel failed to ask whether the appellant ever did that on any other occasion, e.g., within the time periods alleged in the first two specifications of Charge III and not outside the statute of limitations. We are satisfied that the evidence is legally and factually sufficient to sustain a modified finding of guilty under Specification 1 of Charge III, which alleges indecent acts with a child, deleting reference to "digitally penetrating her vagina." Regarding Specification 2 of Charge III, the trial counsel failed to ask whether any of the indecent acts, which LG described in her testimony as occurring when she was 15 years old, continued to occur after she turned 16. Although the clear inference of guilt arises from the evidence because of the number of various sexual acts that occurred during the years of the appellant's abuse of LG, we hold the evidence on Specification 2 of Charge III is legally insufficient. *Reed*, 54 M.J. at 41; *Turner*, 25 M.J. at 324.

Mil. R. Evid. 412 Evidence

The appellant claims that the military judge erred by preventing the defense from presenting evidence concerning LG's purported motive to fabricate her allegations against the appellant. We disagree.

The defense moved at trial, pursuant to Mil. R. Evid. 412(b)(1)(C), to offer evidence of LG's past sexual behavior. The defense theory of admissibility of the purported other sexual behavior by LG was that it showed LG's motive to fabricate the allegations she made against the appellant and that exclusion of the evidence would violate the constitutional rights of the appellant. Pursuant to Mil. R. Evid. 412(c)(2), the military judge held a closed hearing to receive the evidence. LG elected to be present during the hearing and to testify.

The evidence consisted of the testimony of MB, the appellant's 13-year-old son. MB claimed that LG sexually molested him about 60 times from sometime during the first year of her babysitting until she stopped babysitting in July 1999. MB said he was 9 years old when LG first molested him. MB admitted that the first time he told anyone about the molestations was in

March 2000, while he was in a counseling session with Walter Swinhoe, a licensed psychotherapist and counselor. He explained that his parents wanted him to see this counselor[4] because he had engaged in improper sexual behavior, i.e., touched the vaginas and buttocks of two 7-year-old cousins, got on the roof of the house to watch his mother take a shower, and got in the shower with his younger sister. MB also admitted he asked the counselor to report his allegations about LG to the police. After MB testified, the military judge gave LG the opportunity to testify. She took the stand and testified that she had not engaged in any sexual activity with MB.

The defense claimed that the evidence presented by MB's testimony was relevant to attack LG's credibility by showing a motive for her to fabricate the allegations she made about the appellant. The military judge ruled the evidence was not relevant because it did not suggest a motive to fabricate. The fact cited by the military judge as important in this conclusion was that LG made her allegations

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[4] The appellant had been in counseling with the same psychotherapist. *See* Appellate Exhibit XI, Stipulation of Expected Testimony of Walter Swinhoe.

about the appellant about eight months before MB made his allegations about LG. In addition to finding the evidence irrelevant, the military judge also ruled the evidence "clearly not constitutionally required under these circumstances."

In arguing the motion at trial and the issue on appeal, the appellant has claimed that Mil. R. Evid. 412 does not apply. We will address this question before turning to the question of relevance.

As amended in 1998, Mil. R. Evid. 412(a) provides:

> (a) *Evidence generally inadmissible*. The following evidence is not admissible in any proceeding involving **alleged sexual misconduct** except as provided in subdivisions (b) and (c):
>
> (1) Evidence offered to prove that any **alleged victim** engaged in other sexual behavior.
>
> (2) Evidence offered to prove any **alleged victim's** sexual predisposition.

(Emphasis added.)

The 1998 amendment has created a question of what type of alleged sexual misconduct was intended to be covered by the rule. Prior to 1998, the language of Mil. R. Evid. 412 supported the conclusion that the rule only applied in cases wherein nonconsensual sexual offenses were alleged.[5] With the 1998 amendment, use of the term "nonconsensual sexual offense" was replaced with "involving alleged sexual misconduct." However, the title of the rule still contains reference to "nonconsensual sexual offenses" and the term, even though not used in the text of the rule, is defined at the end of the rule. Mil. R. Evid. 412(e). A fair appraisal of the 1998 changes to the rule would seem to require the concession that the intentions behind the changes are clouded in ambiguity.

Our colleagues in the Coast Guard have resolved the question for themselves, stating: "However, as the title of the rule, itself, and subparagraph (e) make plain, the rule properly

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[5] Until the 1998 amendment, Mil. R. Evid. 412 was superceded by Fed. R. Evid. 412 in 1994 by operation of Mil. R. Evid. 1102. *United States v. Sanchez*, 44 M.J. 174, 177, n. 4 (1996).

applies only to nonconsensual sexual misconduct." *United States v. Stirewalt*, 53 M.J. 582, 588 (C.G. Ct. Crim. App. 2000). We do not agree with this conclusion. We certainly do not see the applicability of the rule as plainly stated within it.

Mil. R. Evid. 412(e) states:

> A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

Why would the drafters of the 1998 amendment leave the words "nonconsensual sexual offenses" in the title of the rule and continue to define the term without change but otherwise delete reference to the term in the text of the rule? We are not in a position to definitively answer this question. The rationale offered by our Coast Guard colleagues is unconvincing: "The inclusion of a definition of 'nonconsensual sexual offense' is unique to the

military version of the 'rape shield' rule. Adultery is a crime under the UCMJ, but it is not otherwise a federal criminal offense. Thus, the need for differentiating nonconsensual sexual offenses is largely confined to the military context." *Stirewalt*, 53 M.J. at 588, n. 6. The unfortunate implication of this viewpoint is that consensual sexual offenses have no victims within the meaning of the rule. We decline to interpret the rule in this manner. Our view is that victims deserve protection regardless of the nature of the alleged sexual misconduct.

The 1998 amendment to Mil. R. Evid. 412 incorporated changes made to Federal Rule of Evidence 412 in 1994. *See Manual for Courts-Martial, United States (MCM)*, A22 (2000 ed.).

> As amended by Congress, [Federal] Rule 412 applies in all civil and criminal cases "involving alleged sexual misconduct." This term is left undefined. Clearly it applies to cases alleging rape and sexual abuse, whether civil or criminal. But the breadth of the term "involving alleged sexual misconduct" seems also to cover such claims as for sexual

> harassment in employment. As such, the amended Rule is far broader tha[n] the original Rule, which was limited to criminal cases in which a sex crime was charged.

Stephen A. Saltzburg, et al., *Federal Rules of Evidence Manual*, Vol. 2, § 412.02[1] (8th ed. 2002) (citations omitted).

We believe the impact of the 1998 amendment changed the focus of the question of the substantive applicability of the rule from the nature of the alleged sexual misconduct to the status of the person against whom the Mil. R. Evid. 412 evidence is offered.[6] The question is whether the person is a victim of alleged sexual misconduct, not whether the alleged sexual misconduct is nonconsensual. As stated in the Analysis of the Military Rules of Evidence on the 1998 amendment to Mil. R. Evid. 412. "Rule 412 does not, however, apply unless the person against who the evidence is offered can

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[6] An equally interesting procedural issue is in what forums does Mil. R. Evid. 412 apply, i.e., what was intended by the 1998 amendment changing the language of the rule from "in a case" to "in any proceeding"? This issue is not now before us.

reasonably be characterized as a 'victim of alleged sexual misconduct.'" MCM, A22-36. This makes applicability of the rule consistent with the purpose of the rule, i.e., to protect alleged victims of sexual misconduct from unwarranted invasions of privacy and character assassinations. *See Id. See also Michigan v. Lucas*, 500 U.S. 145, 150 (1991) ("rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy").

In the appellant's case, as we described earlier, the appellant's offenses constituted a course of conduct that occurred over a period of time that extended to when LG was under 16 years of age and, therefore, a child, and continued past her sixteenth birthday. We have previously held that Mil. R. Evid. 412 protections apply to cases involving alleged child victims of sexual abuse. *United States v. Johnson*, 17 M.J. 517 (A.F.C.M.R. 1983) (rejecting appellant's argument that 412 was not applicable to carnal knowledge because it was not a "nonconsensual sexual offense"). Under the circumstances of this case, we see no serious question whether LG was a victim of the alleged sexual misconduct—given her status as a child when the appellant began his pattern of criminal

sexual abuse of LG, she clearly was a victim. Therefore, we hold Mil. R. Evid. 412 is applicable to the resolution of the issue raised by the appellant.

We review a military judge's decision on admission of evidence for a clear abuse of discretion. *United States v. Johnson*, 46 M.J. 8, 10 (1997). The judge's decision must be "arbitrary," "clearly unreasonable," or "clearly erroneous" to be reversed on appeal. *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987).

Mil. R. Evid. 412 has been described by our superior court as primarily a rule of relevance. *United States v. Saipaia*, 24 M.J. 172, 175 (C.M.A. 1987), *cited in United States v. Williams*, 37 M.J. 352, 359 (C.M.A. 1993). *See United States v. Jensen*, 25 M.J. 284, 286 (C.M.A. 1987) ("Relevance is the key to determining when the evidence is 'constitutionally required to be admitted.'"), *cited in United States v. Carter*, 47 M.J. 395, 396 (1998). *See also United States v. Buenaventura*, 45 M.J. 72, 79-80 (1996) and cases cited therein; *United States v. Sanchez*, 44 M.J. 174 (1996) and cases cited therein.

> To overcome the prohibition of Mil. R. Evid. 412, the defense must establish a foundation

> demonstrating constitutionally required relevance, such as "testimony proving the existence of a sexual relationship that would have provided significant evidence on an issue of major importance to the case ...." "[D]efense counsel has the burden of demonstrating why the general prohibition in Mil. R. Evid. 412 should be lifted to admit evidence of the sexual behavior of the victim...."

Carter, 47 M.J. at 396 (citations omitted).

The military judge conducted the necessary hearing to permit the defense to satisfy their burden to show the admissibility of the proffered evidence. We agree with the military judge that the evidence was irrelevant. Mil. R. Evid. 401, 402. And, as the military judge implied, even if there may have been relevance to the evidence, that relevance was so tenuous as to not require its admission. The appellant claims the testimony of his son shows that LG had a motive to fabricate the allegations she made about the appellant. The circumstances do not support this claim. To the contrary, the motive to fabricate was with the appellant's son.

His claims about LG molesting him came nearly 8 months after LG told authorities about the appellant's crimes. And the son's claims about LG were communicated to the appellant's counselor and were made with a request that the counselor report the claims to the police. The son's claims were a desperate attempt to save his father by attacking the character of LG. Even were we to give any credence to the son's allegations, we fail to see how the behavior provides a motive for LG to fabricate. If the allegations are true, the behavior is likely a bi-product of the appellant's sexual abuse of LG, not evidence that she is a liar. In short, the appellant has not met his burden of showing why the prohibition in Mil. R. Evid. 412 should have been lifted to admit his son's testimony about LG. Carter. We hold that the military judge did not abuse his discretion in refusing to admit the evidence. *Johnson*.

Appellant's Statements to Psychotherapist

The appellant was in counseling with Walter Swinhoe, a psychotherapist, from 1 November 1995 to 19 August 1997. The prosecution sought to introduce as a business record the psychotherapist's notes of admissions made by the appellant during counseling sessions with him. The defense objected, claiming the notes

were irrelevant and protected by the psychotherapist-patient privilege of Mil. R. Evid. 513. The military judge refused to allow the notes in evidence and informed the trial counsel that, unless the parties agreed to a substitute, they would need to call Walter Swinhoe as a witness if they wanted to introduce the substance of the admissions reflected in the notes. It is apparent from the military judge's remarks that he concluded that the appellant's admissions were relevant and the rules of evidence, particularly Mil. R. Evid. 403 and 513, did not require exclusion of Walter Swinhoe's testimony. The parties later agreed to a stipulation of Walter Swinhoe's expected testimony. The stipulation provided the following:

> 1. I am Walter Swinhoe. I am a licensed psychotherapist and counselor. The [a]ccused was in counseling under my care from 1 November 1995 to 19 August 1997. During the sessions I would take notes concerning our discussions immediately after each session ended. When I prepared these notes the events I recorded were fresh in my mind.

When I prepared the notes, they were accurate. I cannot now completely and accurately recall all of the facts in my notes from this time period.

2. My notes for 1 November 1995 state that "Greg's affect and mood even—he debriefed increased anger toward man that had affair with wife." My notes for 24 November 1995 state that "Increased discussed voiced with increased "urges" when not sexual with wife."

3. My notes for 19 November 1996 state that Greg stated "I give up myself out of fear she'll leave."

4. My notes for 17 December 1996 state that "He voiced having 22 disc of pornographic material."

5. My notes for 25 March 1997 state that "He voiced how difficult it was for him not to be sexual "at this time of year." "I think about it 24 hours a day.""

> 6. My notes for 1 April 1997 state that "Greg voiced that he was told by God to get rid of sexual devices, tapes, disc and photograph. "I erased 13 disc, 5 tapes, threw away devices and burnt pictures." He voiced a sense of loss and relief from behavior. He went out and report that he got off America On-Line and threw away Playboys."

The appellant concedes that the Mil. R. Evid. 513 psychotherapist-patient privilege is not applicable to his court-martial because the communications in question were not made after 1 November 1999. *United States v. Rodriguez*, 54 M.J. 156, 160 (2000). *See also United States v. Paaluhi*, 54 M.J. 181 (2000). The appellant claims the military judge should have excluded the communications contained in the stipulation of Walter Swinhoe's expected testimony because they were irrelevant or so unfairly prejudicial as to require exclusion under Mil. R. Evid. 403. We disagree.

As stated previously, we review a military judge's decision on admission of evidence for a clear abuse of discretion. *Johnson*, 46 M.J. at 10. The judge's decision must be "arbitrary,"

"clearly unreasonable." or "clearly erroneous" to be reversed on appeal. *Travers*, 25 M.J. at 62 (C.M.A. 1987). A military judge has wide discretion under Mil. R. Evid. 403. *United States v. Tyndale*, 56 M.J. 209, 215 (2001) (citing *United States v. Phillips*, 52 M.J. 268, 272 (2000)). Where the military judge weighs the evidence under Mil. R. Evid. 403 and states the reasons for admitting the evidence, the judge will be reversed only for a clear abuse of discretion. *Id.* (citing *United States v. Browning*, 54 M.J. 1, 7 (2000)).

In the appellant's case, the military judge did not state that he conducted a Mil. R. Evid. 403 analysis and did not specifically state his reasons for concluding that the information in the stipulation of expected testimony was admissible. The military judge likely gave no thought to such an analysis because the parties agreed to the stipulation. While the military judge did not ask what the defense position was regarding the earlier objections, the defense counsel also did not say anything about preserving the issues.

We need not decide whether the appellant waived his previous objections to the evidence by entering into a stipulation of expected testimony covering that evidence because we

hold the evidence relevant and not unfairly prejudicial to the appellant. However, to avoid the application of waiver, the better practice is for defense counsel to state on the record the intention of the defense regarding previous objections to evidence subsequently stipulated to. *Cf. United States v. Bridges*, 52 M.J. 795, 801 (A.F. Ct. Crim. App. 2000) (when defense freely stipulates to what a witness would testify, defense waives confrontation on matters contained in stipulation absent a specific objection to the contrary at trial).

The relevance of the appellant's admissions to his psychotherapist, as evidenced in the stipulation of expected testimony, is that they show a motive for the appellant's acts with LG and they corroborate the testimony of LG regarding those subjects. The appellant admitted to harboring anger over his wife's adultery and to having increased urges when not sexual with his wife—easily understood factors that might motivate the appellant to act on his anger and urges by cultivating a sexual relationship with his teenage babysitter. The appellant admitted to possessing various forms of pornography and sexual devices—consistent with LG's testimony about the appellant's introduction of LG to those perversities. While admittedly prejudicial,

we hold the probative value of such evidence to not be substantially outweighed by the danger of unfair prejudice. Mil. R. Evid. 403.

Sentence Reassessment

In light of our decision to modify Specification 1 of Charge III and to set aside the conviction under Specification 2 of Charge III, and to dismiss this specification, we have decided to reassess the sentence rather than return the case for a rehearing. *United States v. Eversole*, 53 M.J. 132 (2000). We "may purge the prejudicial impact of an error at trial if [we] can determine that 'the accused's sentence would have been at least of a certain magnitude.'" *United States v. Harris*, 53 M.J. 86, 88 (2000) (quoting *United States v. Jones*, 39 M.J. 315, 317 (C.M.A. 1994) and *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). "No sentence higher than that which would have been adjudged absent error will be allowed to stand." *Harris*, 53 M.J. at 88 (quoting *Jones*, 39 M.J. at 317 (citing *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990))).

We are confident that, even with the modifications in the findings, the appellant would have received the same sentence as that which was adjudged. The evidence the members

would have received would not have changed. Absent the one specification, the maximum confinement would have been 33 years rather than 38 years as the court members were instructed. This difference would not have changed the sentence imposed and approved. In making our decision, particularly because the appellant's lengthy service, we have carefully considered the pronouncements of our superior court in *Eversole*. We do not view this case as presenting the "unique type of dilemma [that] ought to be resolved by a trial court if an accused's fundamental right to trial is to be vindicated." *Eversole*, 53 M.J. at 134.

The appellant had 21 years, 4 months active service at the time of his court-martial. But, given the appellant's age, status as a noncommissioned officer, and the serious nature of his repeated criminal acts, we find no miscarriage of justice in affirming his approved sentence. *Eversole*, 53 M.J. at 133.

Conclusion

The finding of guilty of Specification 1 of Charge III is modified as follows: Of Specification 1 of Charge III, guilty, except the words "and digitally penetrating her vagina." Of the excepted words, not guilty. The finding of guilty of Specification 2 of Charge III is set

aside and Specification 2 of Charge III is dismissed.

The approved findings, as modified, and sentence, as reassessed, are correct in law and fact. Article 66(c), UCMJ, 10 U.S.C § 866(c); *Reed*, 54 M.J. at 41 and cases cited therein. Accordingly, the approved findings, as modified, and the sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator

Appendix B

UNITED STATES, Appellee

v.

GREGORY P. BANKER,

Staff Sergeant U.S. Air Force,

Appellant

No. 03-0128

Crim. App. No. 34531

60 M.J. 216

United States Court of Appeals for the Armed Forces

Argued October 2, 2003

Decided August 23, 2004

BAKER, J., delivered the opinion of the Court, in which CRAWFORD, C.J., GIERKE and ERDMANN, JJ., joined. EFFRON, J., filed a

separate opinion concurring in part and the result.

Counsel

For Appellant: Captain Antony B. Kolenc (argued); Colonel Beverly B. Knott, and Major Terry L. McElyea (on brief).

For Appellee: Captain C. Taylor Smith (argued); Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Captain Matthew J. Mulbarger (on brief); Lieutenant Colonel Robert V. Combs.

Amicus Curiae: Margaret A. Olsen (law student)(argued); Nancy Lawler Dickhute, Esq. (supervising attorney)(on brief) – for the Creighton University Law School.

Military Judge: Gregory E. Pavlik

Judge BAKER delivered the opinion of the Court.

Appellant was tried by a general court-martial composed of officer and enlisted members at Sheppard Air Force Base, Texas. Contrary to his pleas, Appellant was convicted of sodomy with a child under the age of 16 years on divers occasions, sodomy on divers occasions, indecent acts with a child under the

age of 16 years on divers occasions, indecent acts on divers occasions, and adultery on divers occasions in violation of Articles 125 and 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 925, 934 (2000), respectively. Appellant was found not guilty of carnal knowledge under Article 120, UCMJ, 10 U.S.C. § 920 (2000). The adjudged and approved sentence provided for a bad-conduct discharge, confinement for two years, and reduction to the lowest enlisted grade. We granted review of the following issues:[1]

I

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY FINDING THAT MIL.R.EVID. 412 APPLIES TO CONSENSUAL SEXUAL MISCONDUCT, AN INTERPRETATION THAT DIRECTLY CONTRADICTS THE FINDING OF THE

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[1] We heard oral argument in this case at Creighton University School of Law, Omaha, NE, as part of the Court's "Project Outreach." *See United States v. Mahoney*, 58 M.J. 346, 347 n.1 (C.A.A.F. 2003).

COAST GUARD COURT OF CRIMINAL APPEALS IN *UNITED STATES V. STIREWALT*, 53 M.J. 582 (C.G. CT. CRIM. APP. 2000).

II.

WHETHER THE MILITARY JUDGE ERRED BY USING MIL.R.EVID. 412 TO EXCLUDE EVIDENCE CONCERNING THE ALLEGED VICTIM'S MOTIVE TO FABRICATE ALLEGATIONS AGAINST APPELLANT WHERE MIL.R.EVID. 412 DOES NOT APPLY TO CONSENSUAL SEXUAL MISCONDUCT AND THE PROFERRED DEFENSE EVIDENCE WAS CONSTITUTIONALLY REQUIRED.

We conclude that neither the Court of Criminal Appeals (CCA) nor the military judge erred.

BACKGROUND

In December 1994, LG, who was 14 years old, began babysitting for Appellant and his

wife. Appellant was 34 years old at the time and had a nine-year old son (MB) and a five-year old daughter. Appellant and his family resided in on-base housing at Sheppard Air Force Base during most of the years LG babysat. LG babysat for the Bankers on a regular basis and participated in other family activities such as attending dinner and church.

In early 1995, Appellant initiated sexual contact with LG. While driving her home one evening after babysitting, Appellant parked the car, pretended to be lost, and kissed LG sticking his tongue in her mouth. Appellant's physical contact with LG steadily increased as he would deliberately brush his hand against her breasts and buttocks when they passed in a hallway or doorway. Appellant also introduced LG to pornography by showing her magazines, pictures on his computer, and videotapes. Over time, Appellant progressed to more overt indecent acts including oral and anal sodomy and sexual intercourse. LG considered the relationship with Appellant to be consensual testifying, "I thought that this was a consensual relationship".

Appellant's sexual contact with LG continued until July 1999. During that summer, LG saw the movie "American Pie" and was

disturbed by the movie's portrayal that some men were preoccupied "with getting [females'] virginity." LG later asked Appellant whether the portrayal was accurate and Appellant confirmed that, at least for him, it was true. Upset by Appellant's response, LG stopped engaging in sexual acts with Appellant and subsequently quit babysitting for the Bankers.

LG eventually told a friend about her sexual relationship with Appellant and the friend convinced LG to tell her mother. Upon learning of Appellant's conduct, LG's mother insisted on informing the authorities. As a result, the Air Force Office of Special Investigations (AFOSI) investigated Appellant's activities. Although LG initially minimized Appellant's conduct when interviewed by an AFOSI agent, she later revealed the details of his acts.

During trial, Appellant moved pursuant to Military Rule of Evidence 412(b)(1)(c) [hereinafter M.R.E.] to offer evidence of LG's alleged sexual behavior with Appellant's son MB, who was 13 years old at the time of trial. Appellant sought to admit MB's allegations in an attempt to prove that LG had a motive for fabricating the accusations against Appellant. Appellant further argued that excluding MB's testimony violated Appellant's constitutional

rights. The military judge subsequently held a closed hearing where both LG and MB testified.

The only testimony presented at the hearing regarding LG's purported sexual behavior was the testimony of MB. Despite defense counsel's claim that MB's testimony was relevant to attack LG's credibility, the military judge found the evidence not relevant.

ISSUE I

M.R.E. 412 states:

> Rule 412. Nonconsensual sexual offenses; relevance of victim's behavior or sexual predisposition
>
> (a) Evidence generally inadmissible. The following evidence is not admissible in any proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
>
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
>
> (2) Evidence offered to prove any alleged

victim's sexual predisposition.

(b) Exceptions.

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the accused.

...

(c) Procedure to determine admissibility.

(3)If the military judge determines on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be

examined or cross-examined.

...

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

M.R.E. 412 is modeled after Federal Rule of Evidence 412 [hereinafter Fed. R. Evid.]. Like the federal rule, M.R.E. 412 was intended to "safeguard the alleged victim against the invasion of privacy and potential embarrassment that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process." Manual for Courts-Martial, United States (2002 ed.) [hereinafter MCM], Analysis of the Military Rules of Evidence [hereinafter Drafter's Analysis] at A22-36. "By affording

victims protection in most instances, the rule encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders." Notes of Advisory Committee on proposed 1994 amendment, F.R.E. 412, 28 U.S.C.S. Appx 412 at 87. M.R.E. 412 was intended to protect victims of sexual offenses from the degrading and embarrassing disclosure of intimate details of their private lives while preserving the constitutional rights of the accused to present a defense. *See United States v. Sanchez*, 44 M.J. 174, 178 (C.A.A.F. 1996); MCM, Drafter's Analysis at A22-36. Appellant maintains, however, that M.R.E. 412 is not applicable to his case since the rule only applies to nonconsensual sexual offenses and he was not charged with any nonconsensual sexual offenses. In making this argument, Appellant relies on the title to the rule, "nonconsensual sexual offenses," as well as the presence within the text of a definition of "nonconsensual sexual offense." M.R.E. 412(e). Furthermore, the Coast Guard court in *Stirewalt*, 53 M.J. at 587, found that M.R.E. 412 only applies when there is an alleged victim of a nonconsensual sexual offense.

Despite the Coast Guard court's ruling in *Stirewalt*, the Air Force Court of Criminal

Appeals determined in this case that the 1998 amendments to M.R.E. 412 "changed the focus of the question of the substantive applicability of the rule from the nature of the alleged sexual misconduct to the status of the person against whom the evidence is offered pursuant to M.R.E. 412. The question is whether the person is a victim of alleged sexual misconduct, not whether the alleged sexual misconduct is nonconsensual." *United States v. Banker*, 57 M.J. 699, 703 (A.F. Ct. Crim. App. 2002). Specifically, in 1998, M.R.E. 412 was amended substituting within the text of the rule the phrase "alleged sexual misconduct" in lieu of "nonconsensual sexual offense." This amendment reflected the 1995 amendments to Fed. R. Evid. 412. Violent Crime Control and Law Enforcement Act of 1994 § 40141, Pub. L. No. 103-322, 108 Stat. 1796, 1918-19 (1994).

Nonetheless, the title and definition at the end of M.R.E. 412 still refer to "nonconsensual sexual offenses." As a result, Appellant's argument warrants further analysis.

M.R.E. 412 defines a nonconsensual sexual offense as "a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy,

assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses." M.R.E. 412(e). Significantly, the list of offenses cited within the rule is presented as an inclusive rather than an exclusive list. Moreover, courts have interpreted the rule in this manner.[2] As importantly, the Drafter's Analysis makes clear M.R.E. 412 was intended to apply broadly because "[t]here is thus no justification for limiting the scope of the Rule, intended to protect human dignity and to ultimately encourage the reporting and prosecution of sexual offenses, only to rape and/or assault with intent to commit rape." MCM, Drafter's Analysis at A22-36.

In our view, the 1998 amendment to M.R.E. 412 was intended to shift the focus of the rule to the presence and protection of a victim rather than the nature of the sexual conduct. This intent is reflected in the Manual for Courts-

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[2] Although consent is not an element of carnal knowledge because victims of the crime are legally incapable of consent, carnal knowledge is the type of offense contemplated by M.R.E. 412(e) which was intended to be broader in its application than the federal rule. *See* MCM, Drafter's Analysis at A22-36; *see also United States v. Vega*, 27 M.J. 744, 746 (A.C.M.R. 1988), *rev. denied*, 28 M.J. 336 (C.M.A. 1989).

Martial as well as case law. *See Vega*, 27 M.J. at 746; *see also Sanchez*, 44 M.J. at 177-78. The analysis of the rule explains, "The terminology 'alleged victim' is used because there will frequently be a factual dispute as to whether the sexual misconduct occurred. Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a 'victim of alleged sexual misconduct.'" MCM, Drafter's Analysis at A22-36.

As amended, M.R.E. 412 is not limited to nonconsensual sexual offenses, but applies to proceedings involving alleged sexual misconduct. As a result, we conclude, as did the CCA, that following the 1998 amendments, the applicability of M.R.E. 412 hinges on whether the subject of the proferred evidence was a victim of the alleged sexual misconduct and not on whether the alleged sexual misconduct was consensual or nonconsensual. Therefore, as a threshold matter, we must determine whether the CCA appropriately classified LG as a victim of Appellant's sexual misconduct.

Appellant asserts LG consented to the sexual activity in light of her testimony that "the relationship was consensual." This Court, however, has distinguished between factual and

legal consent where children are involved. *See United States v. Baker II*, 57 M.J. 330, 335 (C.A.A.F. 2002). In *Baker II*, a case involving a 15 year old and an 18 year old Airman who engaged in factually consensual sexual activity, this Court concluded that prior to determining the decency of the acts or whether legal consent existed, the court must consider the child's age, relationship with the accused, and the nature of the sexual acts. *Id.* at 335-36. Thus, this Court declined to adopt a per se rule regarding the age an individual can consent to certain forms of sexual activity. *Id.* "[T]here is no magic line of demarcation between decent acts and indecent acts based precisely on the age of the sex partner." Id. at 335 (quoting *United States v. Strode*, 43 M.J. 29, 32 (C.A.A.F. 1995)). However, while the *Baker II* Court concluded that a child under the age of 16 may factually consent to certain sexual activity, this Court has never recognized the ability of a child to legally consent to sexual intercourse or sodomy.

At the time Appellant's sexual activity began with LG, LG was 14 years old. Appellant was 34 years old. Although the UCMJ does not explicitly provide an age of consent for sodomy or indecent acts, the age of consent for sexual intercourse is 16. Arts. 120, 125, UCMJ.

Because both sodomy and sexual intercourse with a child under the age of 16 are indecent acts involving penetration, we conclude that LG was not capable of legally consenting to Appellant's conduct.

As a result, based on the facts of this case and the purpose behind M.R.E. 412, we conclude LG was a "victim" of the sexual misconduct for which Appellant was found guilty. Therefore, Appellant's proffer of MB's testimony falls within the scope of M.R.E. 412. The question remains, however, whether MB's testimony was admissible in light of the rule's relevancy and balancing requirements.

ISSUE II

A. Factual Context

During the military judge's closed hearing to adjudicate Appellant's M.R.E. 412 motion, MB testified that LG began sexually molesting him during her first year of babysitting when MB was nine years old. According to MB, LG molested him approximately 60 times and continued to abuse him until she stopped babysitting for the family in July 1999. MB initially disclosed these allegations during a counseling session he attended following his inappropriate sexual behavior with his cousins, his sister, and his mother. MB revealed these

allegations eight months after Appellant's conduct with LG was reported to AFOSI. The military judge denied admission of MB's testimony under M.R.E. 412 after finding the evidence not relevant.

During the trial, Appellant's counsel argued that MB's testimony was relevant because it went "directly to [LG's] credibility and motive to fabricate." On appeal, Appellant maintains LG's allegations of sexual abuse against Appellant were made in an effort to protect her from future allegations involving her sexual misconduct with MB. Appellant further contends on appeal that LG made this preemptive strike so that any allegations by MB would be considered suspect and disregarded as not credible.

B. Legal Context

M.R.E. 412 in popular nomenclature is a "rape shield law." As noted above, its purpose is to protect alleged victims of sexual offenses from undue examination and cross-examination of their sexual history. Thus, M.R.E. 412 is a rule of exclusion. Although Fed. R. Evid. 412 is generally understood to address evidence of sexual propensity, M.R.E. 412 is broader in its reach than its federal counterpart. *See* MCM, Drafter's Analysis at A22- 35 (stating that

"[a]lthough substantially similar in substantive scope to Federal Rule of Evidence 412, the application of [M.R.E. 412] has been somewhat broadened and the procedural aspects of the Federal Rule have been modified to adapt them to military practice"). Under M.R.E. 412, not only is evidence of the alleged victim's sexual propensity generally inadmissible, evidence offered to prove an alleged victim engaged in "other sexual behavior" is also generally excluded.

However, this rule is not absolute because there are three exceptions to M.R.E. 412. First, evidence of specific instances of sexual conduct is admissible to prove that a person other than the accused was the source of semen, physical injury, or other physical evidence. M.R.E. 412(b)(1)(A). Second, evidence of specific instances of sexual behavior by the alleged victim with the accused may be offered to prove consent. M.R.E. 412(b)(1)(B) expressly contemplates that such evidence might be offered by an "accused to prove consent or by the prosecution." *Id.*

"[E]vidence the exclusion of which would violate the constitutional rights of the accused" is also admissible as the third exception to the rule. M.R.E. 412(b)(1)(C). This exception

addresses an accused's Sixth Amendment right of confrontation and Fifth Amendment right to a fair trial. *Weinstein's Federal Evidence*, § 412.03[4] [a] (2d ed. 2003). The text itself, however, is presented in the form of legal conclusion rather than analytic framework. As a result, where evidence is offered pursuant to this exception, it is important for defense counsel to detail an accused's theory of relevance and constitutional necessity.

In order to overcome the exclusionary purpose of M.R.E. 412, an accused must "demonstrat[e] why the general prohibition in [M.R.E.] 412 should be lifted to admit evidence of the sexual behavior of the victim[.]" *United States v. Moulton*, 47 M.J. 227, 228 (C.A.A.F. 1997). In particular, the proponent must demonstrate how the evidence fits within one of the exceptions to the rule. *Id.* at 228-29. In light of the important and potentially competing constitutional and privacy claims incumbent in M.R.E. 412, the rule requires a closed hearing to consider the admission of the evidence. Among other things "[t]he victim must be afforded a reasonable opportunity to attend and be heard" at this closed hearing. M.R.E. 412(c)(2).

Based on the evidence presented at the closed hearing, the military judge applies a two-part process of review to determine if the evidence is admissible. M.R.E. 412(c)(3). First, pursuant to M.R.E. 401, the judge must determine whether the evidence is relevant. Evidence is relevant if it has "any tendency to make the existence of any fact...more probable or less probable than it would be without the evidence." M.R.E. 401. Where the military judge determines that evidence is relevant, the judge employs a second analytic step by conducting a balancing test to determine whether "the probative value of such evidence outweighs the danger of unfair prejudice[.]" M.R.E. 412(c)(3). The accused has a right to put on testimony relevant to his theory of defense. However, "the right to present relevant testimony is not without limitation. The right may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Michigan v. Lucas*, 500 U.S. 145, 149 (1991)(citations omitted).

Although this two-part relevance-balance analysis is applicable to all three of the enumerated exceptions, evidence offered under the constitutionally required exception is subject to distinct analysis. Under M.R.E. 412(b)(1)(c),

the accused has the right to present evidence that is "relevant, material, and favorable to his defense." *United States v. Dorsey*, 16 M.J. 1, 5 (C.M.A. 1983)(citing *United States v. Valenzuela-Bernal*, 458 U.S. 858(1982)). While the relevancy portion of this test is the same as that employed for the other two exceptions of the rule, if the evidence is relevant, the military judge must then decide if the evidence offered under the "constitutionally required" exception is material and favorable to the accused's defense, and thus whether it is "necessary." *United States v. Williams*, 37 M.J. 352, 361 (C.M.A. 1993)(Gierke, J., concurring).

In determining whether evidence is material, the military judge looks at "the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to this issue." United States v. *Colon-Angueira*, 16 M.J. 20, 26 (C.M.A. 1983)(quoting *Dorsey*, 16 M.J. at 6).

After determining whether the evidence offered by the accused is relevant and material, the judge employs the M.R.E. 412 balancing test in determining whether the evidence is favorable to the accused's defense. While the

term "favorable" may not lend itself to a specific definition, we believe that based on Supreme Court precedent and our own Court's rulings in this area, the term is synonymous with "vital." *Valenzuela-Bernal*, 458 U.S. at 867 (quoting *Washington v. Texas*, 388 U.S. 14, 16 (1967)); *Dorsey*, 16 M.J. at 8.

Although the M.R.E. 412 balancing test bears resemblance to the M.R.E. 403 balancing test, the two tests are distinct. This is evident from the text and intent of the two rules.

M.R.E. 412(c)(3) states:

> If the military judge determines on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(Emphasis added.)

The M.R.E. 403 balancing test states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Emphasis added.)

The balancing test contained in M.R.E. 412(c)(3) differs in two critical respects from that contained in M.R.E. 403. First, under the M.R.E. 403 balancing test, a presumption of admissibility exists since the burden is on the opponent to show why the evidence is inadmissible. M.R.E. 403 is a rule of inclusion.

In contrast, M.R.E. 412 is a rule of exclusion. The burden of admissibility shifts to the proponent of the evidence to demonstrate why the evidence is admissible. *United States v. Greaves*, 40 M.J. 432, 438 (C.M.A. 1994)(citing *United States v. Elvine*, 16 M.J. 14 (CMA 1983)); 1 Stephen A. Saltzburg et al., *Military*

Rules of Evidence Manual 4-189-90 (5th ed. 2003). Thus, the two rules lean in different directions: i.e., toward inclusion in the case of M.R.E. 403 and toward exclusion in the case of M.R.E. 412(c)(3).

Second, M.R.E. 403 is generally applicable to evidence offered by either the government or the accused. To exclude evidence under M.R.E. 403 the military judge must find "substantial prejudice" leading to one of a number of enumerated harms, including "unfair prejudice" to the accused. M.R.E. 412(a)'s general rape shield rule is applicable to both parties. However, in contrast to M.R.E. 403, the balancing test that M.R.E. 412(c)(3) establishes for exceptions to the general rule contemplates "evidence that the accused seeks to offer[.]" M.R.E. 412(c)(3).

Thus, M.R.E. 412(c)(3) requires the military judge to determine "on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice[.]" M.R.E. 412(c)(3)(emphasis added). It would be illogical if the judge were to evaluate evidence "offered by the accused" for unfair prejudice to the accused. Rather, in the

context of this rape shield statute, the prejudice in question is, in part, that to the privacy interests of the alleged victim. *Sanchez*, 44 M.J. at 178 ("[I]n determining admissibility there must be a weighing of the probative value of the evidence against the interest of shielding the victim's privacy.").

As a result, when balancing the probative value of the evidence against the danger of unfair prejudice under M.R.E. 412, the military judge must consider not only the M.R.E. 403 factors such as confusion of the issues, misleading the members, undue delay, waste of time, needless presentation of cumulative evidence, but also prejudice to the victim's legitimate privacy interests.[3] *See Sanchez*, 44 M.J. at 178; 2 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 160 (2d ed. 1994).

C. As Applied in Appellant's Case

Having considered the textual framework of M.R.E. 412 and established our analytic framework, our next step is to apply this

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[3] M.R.E. 412 does not wholly supplant M.R.E. 403 since the military judge may exclude evidence on M.R.E. 403 grounds even if that evidence would otherwise be admissible under M.R.E. 412.

analysis to Appellant's case.[4] We review a judge's decision to exclude evidence under M.R.E. 412 for abuse of discretion.

Appellant argued at trial that M.R.E. 412 was not applicable to his case based on the arguments presented in Issue I of this opinion. Arguing in the alternative, Appellant offered the testimony of MB under M.R.E. 412 because it went "directly to ["LG's"] credibility and motive to fabricate." However, other than maintaining that MB's testimony went to LG's credibility in a general sense, defense counsel failed to articulate a specific theory or motive as to why LG might have fabricated the allegations against Appellant. In response, trial counsel argued "there's no evidence of motive, so our position is that it is not relevant."

As a threshold matter, the judge correctly determined that M.R.E. 412 was the applicable rule of evidence. As noted above, M.R.E. 412 applies not only to propensity evidence, but also to evidence of the victim's "other sexual behavior." An allegation of sexual molestation by the child LG was babysitting fits within the category of "other sexual behavior." That is not

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[4] Consistent with the purposes of M.R.E. 412, the trial record of the M.R.E. 412(b) hearing is sealed.

to say that M.R.E. 412 bars inquiry regarding a victim's alleged sexual misconduct. Rather, the M.R.E. 412 is intended to shield a victim from having their own sexual conduct and history placed at issue, unless the military judge first determines in the closed hearing that such inquiry is warranted by the rule. The military judge did just that in Appellant's case, holding a closed hearing concerning MB's putative testimony.

During the closed hearing, the military judge noted that MB made his allegations eight months after LG made her allegations against Appellant. When pressed by the military judge as to how this evidence related to any motive to fabricate, defense counsel responded as follows: "Your honor, she made her allegations months after this supposed relationship with my client started and yet the same kind of principle-and it does go directly--." After hearing this evidence, the judge ruled MB's testimony was not relevant and, therefore, inadmissible. Specifically, the judge stated:

> This evidence is not relevant to the findings portion, regardless of its truth. And there's serious question as to whether it's true based upon the lack of credibility

> of [MB], specifically the circumstances under which this was disclosed after he, himself was in trouble. But that notwithstanding, because that would not be determinative of the issue as far as this Court is concerned, as to whether the evidence would get before the court members. I have to assume for the purpose of the motion that the allegations that [MB] makes are true. Nevertheless, they are not relevant and they're clearly not constitutionally required under these circumstances.

Notably, while expressing reservations about the veracity of MB's putative testimony, the judge correctly identified credibility as an issue for the members. In applying M.R.E. 412, the judge is not asked to determine if the proferred evidence is true; it is for the members to weigh the evidence and determine its veracity. Rather, the judge serves as gatekeeper deciding first whether the evidence is relevant and then whether it is otherwise competent, which is to say, admissible under M.R.E. 412. Thus, in the case of the third exception argued

by Appellant, the judge determined whether admission of MB's allegations would be constitutionally required if there was evidence sufficient to support a finding that they were true. *United States v. Platero*, 72 F.3d 806, 812 (10th Cir. 1995).[5]

While evidence of a motive to fabricate an accusation is generally constitutionally required to be admitted, the alleged motive must itself be articulated to the military judge in order for him to properly assess the threshold requirement of relevance. *See Dorsey*, 16 M.J. at 4. Before this Court, Appellant argues that LG fabricated allegations against him in order to preemptively discredit any allegations that MB might ultimately have made regarding LG's sexual conduct with MB. However, at trial, when pressed by the military judge for a theory of admissibility, defense counsel stated only that MB's testimony went "directly to ["LG's"] credibility and motive to fabricate". The

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[5] "In deciding a competency question, the Judge is not usurping the function of the jury. The Judge is not addressing the merits of the case and deciding whether one side or the other is truthful. Rather, the Judge is assuring that the evidence meets the usual evidentiary standards." *Platero*, 72 F.3d at 812 (citation omitted).

question remained whether Appellant's proffer was adequate to show support for his theory. *Sanchez*, 44 M.J. at 182 (Everett and Gierke, JJ., concurring).

In the context of M.R.E. 412, it was within the judge's discretion to determine that such a cursory argument did not sufficiently articulate how the testimony reasonably established a motive to fabricate. Moreover, based on the analytic structure of M.R.E. 412, in ruling on relevancy the military judge was not also required to address the constitutional exception or the application of the balancing test. Therefore, without more, it was within the discretion of the military judge to conclude that the offered testimony was not relevant. As a result, we hold the military judge did not abuse his discretion in refusing to admit MB's testimony since Appellant did not meet his burden of proving why the M.R.E. 412 prohibition should be lifted.

SUPPLEMENTAL ISSUE

While this case was under review in this Court, Appellant filed a motion for grant of review of a supplemental issue.[6] That motion is

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[6] WHETHER APPELLANT'S CONVICTION FOR VIOLATING ARTICLE 125, UCMJ, BY ENGAGING

granted. Therefore, notwithstanding our resolution of the granted issues, we remand the case to the Court of Criminal Appeals for that court's consideration of the supplemental issue in light of this Court's decision in *United States v. Marcum*, __ M.J. __ (C.A.A.F. 2004).

DECISION

The decision of the United States Air Force Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Air Force for remand to that court for consideration of the supplemental issue and for action not otherwise inconsistent with this opinion.

EFFRON, Judge (concurring in part and in the result):

I agree with the lead opinion that: (1) Military Rule of Evidence 412 [hereinafter M.R.E.] is not limited to cases involving nonconsensual sexual offenses; (2) in considering whether evidence is admissible

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IN CONSENSUAL SODOMY MUST BE SET ASIDE IN LIGHT OF THE UNITED STATES SUPREME COURT'S HOLDING IN *LAWRENCE V. TEXAS*, 123 S.CT. 2472 (2003).

under the rule, the military judge must first consider whether the evidence is relevant; (3) if the evidence is not relevant, it is not admissible; and (4) the military judge in this case did not err in concluding that the evidence offered by defense was inadmissible because it was not relevant.

After concluding that the military judge did not err, the lead opinion offers a variety of observations regarding the treatment of relevant evidence under M.R.E. 412. Although there are many instances in which it is appropriate for an appellate court to discuss matters beyond the narrowest possible holding, a degree of caution may be in order when dealing with a developing area of law that is highly fact-dependent. The treatment of relevant evidence under M.R.E. 412 is such an area.

M.R.E. 412 involves numerous unresolved interpretative matters. Perhaps the most difficult aspect of the rule involves the issue of when relevant evidence that is otherwise excluded under the rule must nonetheless be admitted because exclusion of the evidence "would violate the constitutional rights of the accused." M.R.E. 412(b)(1)(C). *See, e.g.*, 1 Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* 4-186-88 (5th ed. 2003). Stephen A.

Saltzburg et al., 2 *Federal Rules of Evidence Manual* 412-7-10 (8th ed. 2002). This is an area in which most cases are likely to involve evidentiary considerations common to both civilian and military trials. In that context, we should not constrain military judges in future trials from considering a wide range of judicial opinions from other courts, as well as scholarly works, when confronting M.R.E. 412 relevancy issues not governed by our precedents. Under these circumstances, I respectfully decline to join that portion of the lead opinion that addresses admissibility of relevant evidence under M.R.E. 412.

Appendix C

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant GREGORY P. BANKER
United States Air Force

ACM 34531 (f rev)
63 M.J. 657

29 June 2006

Sentence adjudged 9 February 2001 by GCM convened at Sheppard Air Force Base, Texas. Military Judge: Gregory E. Pavlik.

Approved sentence: Bad-conduct discharge, confinement for 2 years, and reduction to E-1

Appellate Counsel for Appellant: Major Sandra K. Whittington (argued), Colonel Beverly B. Knott, Colonel Carlos L. McDade, Lieutenant

Colonel Timothy W. Murphy, Lieutenant Colonel Andrew S. Williams, Major Terry L. McElyea, Major Jeffrey A. Vires, Major Jefferson B. Brown, Major Patrick J. Dolan, Major Antony B. Kolenc, and Major Maria A. Fried.

Appellate Counsel for the United States: Major Lane A. Thurgood (argued), Colonel Anthony P. Dattilo, Colonel LeEllen Coacher, Colonel Lance B. Sigmon, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Adam Oler, Major Matthew J. Mulbarger, and Major C. Taylor Smith.

Before

ORR, JOHNSON, and JACOBSON

Appellate Military Judges

OPINION OF THE COURT

UPON FURTHER REVIEW

JOHNSON, Judge:

Contrary to his pleas, the appellant was convicted by a general court-martial composed of officer and enlisted members of sodomy with

a child under the age of 16 years on divers occasions (Specification 1, Charge II), sodomy on divers occasions (Specification 2, Charge II), indecent acts with a child under the age of 16 years on divers occasions (Specification 1, Charge III), indecent acts on divers occasions (Specification 2, Charge III), and adultery on divers occasions (Specification 3, Charge III), in violation of Articles 125 and 134, UCMJ, 10 U.S.C. §§ 925, 934. In accordance with his pleas, he was found not guilty of carnal knowledge (Charge I), in violation of Article 120, UCMJ, 10 U.S.C. § 920. The adjudged and approved sentence included a bad-conduct discharge, confinement for 2 years, and reduction to E-1.

This case is before our Court for the second time. In *United States v. Banker*, 57 M.J. 699 (A.F. Ct. Crim. App. 2002), we set aside and dismissed Specification 2 of Charge III, modified Specification 1 of Charge III, and affirmed the findings, as modified, and the sentence, as reassessed. On appeal, our superior court set aside our decision and returned the record of trial to The Judge Advocate General of the Air Force for remand to our Court for consideration of a supplemental issue and for action not otherwise inconsistent with their

opinion. *United States v. Banker*, 60 M.J. 216 (C.A.A.F. 2004). The appellant subsequently asked our superior court to reconsider their decision. On 4 January 2005, the Court of Appeals for the Armed Forces (CAAF) denied the request for reconsideration. *United States v. Banker*, 60 M.J. 452 (C.A.A.F. 2005).

CAAF specified the following issue: Whether the appellant's conviction for violating Article 125, UCMJ, 10 U.S.C. § 925, by engaging in consensual sodomy must be set aside in light of *Lawrence v. Texas*, 539 U.S. 558 (2003). On 20 April 2005, this Court specified the following additional issues: (1) Whether the disparity in age between the victim and the appellant, as well as the appellant's prior grooming of the victim to engage in sexual conduct while she was under the age of consent, placed the victim in a relationship where consent might not easily be refused in light of *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). Should the Court apply an objective or subjective test in answering this question? (2) Whether a 16-year-old is a minor in the context of *Lawrence v. Texas*, 539 U.S. 558 (2003).[1]

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[1] Oral argument was heard on 9 November 2005 on all three issues.

Background

In December 1994, LG, who was 14 years old, began babysitting for the appellant and his wife. The appellant was 34 years old. LG babysat for the appellant on a regular basis and often participated in other family activities. In early 1995, the appellant initiated sexual contact with LG by kissing her and sticking his tongue in her mouth. Over time, the appellant increased his contact with LG from deliberately touching her breasts and buttocks, to engaging in overt indecent activities, including oral and anal sodomy and sexual intercourse. LG considered the relationship with the appellant to be consensual. In fact, she testified, "I thought that this was a consensual relationship." In July 1999, LG, now a 19-year-old, became upset with the appellant and stopped engaging in sexual acts with him. She subsequently stopped babysitting for the appellant's family altogether.

Constitutionality of Article 125, UCMJ

Lawrence protects private sodomy between two consenting adults. *Id.* However, the Supreme Court has determined in certain

situations, consensual sodomy may not qualify for such protection. *Id.* at 578. Constitutional challenges to Article 125, UCMJ, based on the *Lawrence* decision must be addressed on a case-by-case basis. *United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004) (citing *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), *cert. denied*, 544 U.S. 923 (2005). In *Marcum*, the CAAF identified a tripartite framework for addressing these challenges within the military context:

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

Marcum, 60 M.J. at 206-07 (Citations omitted.)

The first prong addresses whether the appellant's conduct involved private, consensual sexual activity between adults. *Id.* at 207. LG was 16 years old and factually, consented to the sodomy. She testified at trial that their relationship was consensual. Furthermore, the evidence established the sexual activity took place in a private location, generally in the appellant's home. We will assume without deciding that the panel's verdict, finding the appellant guilty of consensual sodomy, satisfies the question raised by the first prong. *See id.*

The second prong addresses whether the appellant's conduct falls outside a liberty interest identified by the Supreme Court in *Lawrence*. For example, "did the conduct involve minors? Did it involve public conduct or prostitution? Did it involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused?" Id. We will also assume that the appellant's conduct involved someone who is arguably not a minor[2] because LG was not

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[2] The appellant was convicted of forcible sodomy, Specification 1 of Charge II, when LG was under the age of 16. The conduct that is at issue here, non-forcible or consensual sodomy, Specification 2 of Charge II, happened after LG turned 16 years old.

under the age of 16 years old. The appellant's conduct did not take place in public and it did not involve prostitution. Even after making these assumptions we find that the appellant's conduct falls outside a liberty interest identified by the Supreme Court because it involved a person who was "situated in [a] relationship[] where consent might not easily be refused." *See Lawrence*, 539 U.S. at 578.

The appellant was LG's employer and was 20 years older than LG. LG viewed the appellant as a father figure. She was an integral part of the appellant's family--spending weekends with the family, attending church, and shopping with the family. When LG started babysitting for the appellant she was a 14-year-old virgin. Over several years, the appellant aggressively encouraged LG to engage in sexual activities with him. These activities started with kissing, then escalated to fondling and brushing up against her breasts and body. The appellant showed LG pornography, to include videos and magazines, then later exposed his penis in front of her, and placed a vibrator inside her vagina. The activities then progressed from oral sex, to sexual intercourse, and finally to anal sodomy. LG testified that she was concerned about pleasing the appellant and sought his approval.

She also testified on several occasions that she was confused about her relationship with the appellant. The appellant's progressive grooming of his subordinate babysitter, when she was 14 and 15 years old, spawned a relationship where LG's consent at the age of 16 and older might not easily be refused. This is not the type of private sexual relationship that qualifies for protection under *Lawrence*. Article 125, UCMJ, is constitutional as applied to this appellant.

The appellant argues this Court cannot find criminal liability because he was not put on notice or given an opportunity to oppose the prosecution's evidence concerning the concept of grooming. As a result, the appellant claims he was denied due process. We find the appellant's argument unpersuasive. This Court's finding of a pattern of grooming is merely a conclusion we reached after careful review of the evidence in this case. LG's tender age of 14 when the appellant first approached her sexually, the age disparity between the appellant and LG, the progressive and aggressive nature of the sexual activity over time, as well as LG's admitted confusion about her relationship with the appellant, were all facts

presented at trial. Therefore, the appellant was most certainly on notice of this evidence.

Likewise, the appellant's complaint that he was denied an opportunity to oppose the evidence on the theory that LG was in a relationship where consent could not easily be refused lacks merit. Specifically, the defense's theory of the case was that LG totally fabricated the accusations against the appellant. They asserted that these events never happened. In light of the other charges pending against him, we find it disingenuous for the appellant to now argue the sodomy was consensual, when at trial, he denied the other closely related sexual offenses ever occurred.

We also analyzed this case in light of *United States v. Cendejas*, 62 M.J. 334, 340 (C.A.A.F. 2006). Assuming arguendo the defense were given an opportunity to contest the government's evidence that LG was a person who might not easily refuse consent, we are not convinced that any additional evidence would have overcome the *Lawrence* factors not in dispute. For example LG's age, employment status, and the age disparity between the appellant and LG could not be refuted. Moreover, the appellant's trial defense counsel

vehemently attacked those facts that could be contradicted by impugning LG's credibility. They challenged LG's ability to recall certain details and revealed to the panel members that LG had lied under oath numerous times in the past. Trial defense counsel argued in his closing statement that LG was clearly not credible and was a "confessed liar." And trial defense counsel suggested possible motives for why LG would lie about the sexual encounters. The panel members heard the extensive cross-examination of LG, and they determined that the events occurred. Under these circumstances, coupled with the absence of any proposed evidence the defense would have used to counter the prosecution's evidence that LG was groomed and lacked the ability to easily refuse consent, we are convinced beyond a reasonable doubt that the members would have arrived at the same conclusion.

Legal and Factual Sufficiency

Finally, the appellant argues the sodomy conviction is factually insufficient.[3] We have conscientiously read the record of trial and determined the specification is legally and factually sufficient. *See Jackson v. Virginia*,

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[3] This assignment of error was raised by the appellant during oral argument, but was not briefed.

443 U.S. 307, 319 (1979); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). Specifically, LG testified that the appellant anally sodomized her several times beginning in the summer of 1996. She said the appellant wanted to try something new, so she "allowed him." She indicated the anal sodomy ended in July 1999. As a result, we are convinced of the appellant's guilt beyond a reasonable doubt.

Conclusion

For the reasons set forth in *Banker*, 57 M.J. at 706, and those contained herein, the finding of guilty of Specification 1 of Charge III is modified as follows: Of Specification 1 of Charge III, guilty, except the words "and digitally penetrating her vagina." Of the excepted words, not guilty. The finding of guilty of Specification 2 of Charge III is set aside and dismissed. We are still confident that, even with the modification in the findings, the appellant would have received the same sentence as that which was adjudged. *See United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). We also find this sentence appropriate.

The approved findings, as modified, and sentence, as reassessed, are correct in law and

fact. Article 66(c), UCMJ, 10 U.S.C § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

Appendix D

UNITED STATES, Appellee

v.

GREGORY P. BANKER,
Staff Sergeant U.S. Air Force,
Appellant

No. 03-0128

Crim. App. No. 34531

__ M.J. __

United States Court of Appeals for the Armed Forces

Decided February 20, 2007

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, said petition

is granted and the decision of the United States Air Force Court of Criminal Appeals is affirmed.